

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LM WASTE SERVICE, CORP.

and

UNIÓN DE TRONQUISTAS DE PUERTO  
RICO, LOCAL 901, IBT

and

MARVIN J. CARDONA

and

DS EMPLOYMENT AGENCY, INC.

CASE NO.: 24-CA-10837  
24-CA-10894

**RESPONDENT'S BRIEF IN REPLY TO GENERAL COUNSEL'S ANSWER TO  
RESPONDENT'S EXCEPTIONS**

**TO THE HONORABLE BOARD:**

**COMES NOW**, LM Waste Service, Corp. (hereinafter "LM Waste" or the "Employer"), through the undersigned counsel, and respectfully presents its reply to General Counsel's Answer to Respondent's Exceptions:

On June 10, 2009 Administrative Law Judge ("ALJ"), Keltner W. Locke, issued a Decision in the above captioned cases ("June 10<sup>th</sup> Decision"). On July 24, 2009, LM Waste filed a list of exceptions to the ALJ's decision and a legal brief in support thereof, which General Counsel opposed on August 21, 2009. Pursuant to Section 102.46(g), Respondent files its brief in reply to said answer, which is due today.

**Exception A**

Complaint Paragraph 7(a): LM Waste takes exception of the ALJ's finding that LM Waste's agent Armando Ramos interrogated employees about their Union activities and asked for their

support to get rid of the Union, and created the impression of surveillance in violation of Section 8(a)(1) of the National Labor Relations Act (“the Act”). **See, Exhibit GC-1P; June 10<sup>th</sup> Decision, at pp. 5-7.**

As to this exception, Respondent essentially argued that the testimony offered by employees Reinaldo Santiago, Rafael Maldonado and Felipe Espada regarding an alleged meeting that took place on January 11, 2008 where Armando Ramos (LM Waste supervisor), made some statements that created the impression of surveillance, was controverted by **documentary evidence which made it impossible under the law of nature for the meeting to have taken place;** and as such, should be disregarded. **See, Exhibit R-9(a) & R-9(b)**(showing Ramos’ errands out of the Juana Díaz’s site during the morning of January 11, 2008); **see, Exhibit R-4(a) & R-4(b)**(Deposit Slip signed by both employees which shows that they were in Juana Díaz from 9:15 to 9:25 a.m); see also, Kinney Drugs, Inc. v. N.L.R.B., 74 F. 3d 1419, 1427 (2<sup>nd</sup> Cir. 1996)(determinations made on credibility of witnesses may be overturned when **“they are hopelessly incredible or they flatly contradict either the law of nature or undisputed documentary testimony.”**); Wright Line and Lamoreux, 251 NLRB 1083, n. 1 (1980), *enfd.* 662 F. 2d 899 (1<sup>st</sup> Cir. 1981). The fact that Ramos was not at Juana Díaz on the morning of January 11, 2008, was also confirmed by the testimony of Rafael Martínez, from the Environmental Protection Agency (“EPA”); the person with whom Ramos met that day. **See, Rafael Martínez’s testimony, Tr., pp. 351-353.**

General Counsel argues, however, that the documentary evidence presented by Respondent to demonstrate Ramos’ errands in the EPA was not admissible because it did not comply with Fed. R. Evid. 902(4). General Counsel misconstrues the application of said rule. Fed. R. Evid. 902 only provides that **“extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to...a copy of an official record... filed**

and actually recorded... in a public office... certified as correct by the custodian or other person authorized to make the certification...” Fed. R. Evid. 902(4). First of all, Rule 902(4) only applies to **certified copies of public** records. Respondent never proposed said document as a certified copy of the record. As such, the rule is inapplicable in this case. Moreover, the rule merely establishes a list of documents which do not need to be authenticated by means of extrinsic evidence, as required by Fed. R. Evid. 901, because they are considered “self authenticated”. However, this does not preclude a person from authenticating a document by means of Fed. R. Evid. 901, which provides that the “testimony of [a] witness with knowledge... that a matter is what it is claimed to be” is sufficient to satisfy the requirement of authentication. Ramos testified that Exhibit 9 is the document received by him in the EPA on January 11, 2008, and that it was signed by a representative of said agency. The ALJ credited this testimony, which is sufficient to authenticate it.

Also, General Counsel argues that, contrary to Respondent’s argument, the testimony of Ramos was not corroborated by the testimony of Rafael Martínez. This has no merit. **See, Rafael Martínez’s testimony, Tr., pp. 351-353** (Martínez testified that he met with Ramos at the EPA, on a Friday of January during the morning hours). Also, unlike Maldonado’s, Espada’s and Santiago’s testimony, Mr. Martínez had no interest in the final resolution of the case, and, as such, his testimony is free from biased. Also, contrary to the employees’ testimony, his was **possible**.

General Counsel also argues that the employees’ testimony regarding Ramos’ statements was not contradictory. However, as noted by the ALJ, Espada’s and Maldonado’s testimony was far apart; Maldonado stated that Ramos threatened him with discharge, while Espada did not remember such a remarkable statement. **See, June 10<sup>th</sup> Decision, at p. 6.** As the ALJ noted, this

was questionable. Respondent asserts that said contradiction should have given the ALJ pause, especially in light of the evidence which made it impossible for them to have met with Ramos in Juana Diaz during the morning hours of January 11, 2008, while he was at the other side of the country.<sup>1</sup> In light of the above, the Board should reject the ALJ's credibility determination with regards to the testimony regarding the alleged meeting, because the clear preponderance of all relevant evidence convinces that the meeting did not occur. See, Wright Line, supra, see also, Sutton Realty Co. and Local 32B-32J, Service Employees International Union, 336 NLRB 405, 406-407 (2001). Therefore, the Board should accept Respondent's Exception A.

### **Exception B & C**

Complaint Paragraph 9(a): LM Waste takes exception of the ALJ's finding that LM Waste created the impression among its employees that they were under surveillance and informed them that they were discharged because of their union activities in violation of the Act. See, June 10th Decision, at pp. 9-11.

Complaint Paragraph 9(c):LM Waste takes exception of the ALJ's finding that it violated the Act, when José G. Santiago, an LM Waste supervisor, told former employee Marvin J. Cardona that he had been terminated for the same reasons his co-workers Rafael Cruz and Felipe Espada were fired; for his participation in the union. See, June 10th Decision, at p. 12.

In support of these Exceptions, Respondent argued, *inter alia*, that the testimony credited by the ALJ regarding José G. Santiago's alleged statements to Rafael Cruz and Marvin Cardona, to the effect that they had been terminated because of their union participation, was inadmissible hearsay by a non decision maker, which was not substantial evidence. General Counsel argues that the testimony was not hearsay because it is an "admission by party opponent", an exception to the hearsay rule. In support of this proposition, General Counsel argues that it was stipulated that José Santiago was Respondent's statutory supervisor. The stipulation is irrelevant to this issue. The evidence in the record established that Santiago **had no participation whatsoever in**

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<sup>1</sup> The EPA is located in Río Piedras (the north of Puerto Rico), while Juana Díaz is on the South of the island.

**the termination of Cruz, or any other of the complainants.** General Counsel did not controvert this fact. As such, Santiago's statements as to the alleged reason to terminate the complaints, even if he was considered a supervisor under the Act, are irrelevant and should not be considered an admission by a party opponent. See, Santiago-Ramos v. Centennial P.R. Wireless Group, 217 F. 3d 46 (1<sup>st</sup> Cir. 2000); see also, Mulero-Rodríguez v. Ponte, Inc., 98 F. 3d 670, 675 (1<sup>st</sup> Cir. 1996) (same); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F. 2d 5, 10 (1<sup>st</sup> Cir. 1990). Santiago's lack of participation is, contrary to General Counsel's proposition, **very consequential**. The Board should not permit a statement by a first line supervisor, with no participation in a decision, to be considered an admission. See, Randell Manuf. Of Arizona, Inc. and Sheet Metal Workers' International, Local No. 359, 2001 WL 1598707 (NLRB Div. of Judges 2001)(first-line supervisor's supervisor comment to employees not taken into account because he was not involved in the discharge, and was speaking for the decision-makers, when he made the remark, which is not evidence of union animus.")

Also, Cruz's testimony, contrary to General Counsel's contention was inaccurate and contradictory and should be given little weight. See, Rafael Cruz's testimony, Tr. p. 134 & 136-137 (where Cruz first testified that LM Waste assigned him to drive a smaller truck on November 2007 and that no one requested him to upgrade his license until the day of his termination; while on cross he admitted that he was assigned **temporarily** to drive the truck on May 2007 (not November) and that Julio Torres gave him specific instructions, at least twice, before his termination). Certainly, Cruz's testimony is the very definition of contradictory. Because Cruz's testimony was hopelessly incredible, was biased and unsupported by the clear preponderance of all relevant evidence, the ALJ should have disregarded it. See, Kinney Drugs, Inc., 74 F. 3d at 1427; Beverly Enterprises, Inc.; Wright Line, 251 NLRB 1083 at n. 1.

Finally, because Santiago was not a decision maker in the termination decision of any of the complainants –nor did he influence the decision-, because Cruz’s testimony is unreliable, and because the alleged statements by Santiago to Cruz and/or Cardona constitute *hearsay testimony uncorroborated by independent evidence*, this testimony is insufficient to constitute substantial evidence of a violation of the Act, and the Board should accept Respondent’s Exceptions B & C. See, NLRB v. Imparato Stevedoring Corp., 250 F. 2d 297, 302-303 (1957); see also, Edison v. NLRB, et al, 305 U.S. 197, 230 (1938).

#### **Exception D**

Complaint Paragraphs 11(a) and 11(c): LM Waste takes exception of the ALJ’s finding that it unlawfully discharged employees Rafael Maldonado, Rafael Cruz, Felipe Espada and Reinaldo Santiago because of their union activities. See, June 10th Decision, pp. 13-23.

First, Respondent established in its brief that General Counsel failed to demonstrate, as required by Wright Line, that, at the time of the terminations, Respondent had any knowledge regarding Maldonado’s, Espada’s or Santiago’s union participation. **See, See, Exhibit R-2 & GC-2; Armando Ramos testimony, Tr. pp. 459; María Montalvo Colón testimony, Tr., pp. 284-285, 290-291 & 301** (the petition to unionize was filed with the Board on January 14, 2008 and notified to LM Waste via fax that day during the afternoon hours; while the terminations, took place that same day during the early morning hours). General Counsel alleges that knowledge was established through its witnesses’ testimony regarding Ramos’ alleged statements to Espada, Maldonado and Santiago on January 11, 2008; and by Cruz’s testimony regarding Santiago’s statements made to him after his termination. For the reasons discussed above, said evidence is insufficient to establish that LM Waste had knowledge of Espada’s, Maldonado’s, and Santiago’s union activities prior to their terminations, and the Board should accept Respondent’s Exception D.

### **Exception E-H**

Complaint Paragraphs 11(a) and 11(c): LM Waste takes exception of the ALJ's finding that the discharges of Rafael Maldonado, Felipe Espada and Rafael Cruz were in violation of the Act. See, June 10th decision, at pp. 13-16.

Complaint Paragraphs 11(a) and 11(c): LM Waste takes exception of the ALJ's finding that LM Waste did not prove that it would have discharged Reinaldo Santiago, Rafael Maldonado, Felipe Espada, and Rafael Cruz, even in the absence of their union activities. See, June 10th decision, at pp. 16, 18, 20 & 23.

Respondent established in these exceptions that the terminations of Maldonado, Espada, and Cruz would still have followed, even in the absence of their protected activity. With regards to Maldonado, Respondent demonstrated that he engaged in severe misconduct (i.e. he was profiting personally by servicing non clients and kept his helper under constant duress and threats of physical harm. See, Joel Cruz's testimony, at pp. 359-360, 363 & 366-367. Said testimony was not controverted and was clearly sufficiently severe for LM Waste to terminate him even in the absence of protected conduct. See, J.J. Cassone Bakery, Inc. v. and Bakery, Confectionary and Tobacco Workers' Union, 350 NLRB 86 (2007)(Respondent had sufficient reason to terminate complainant because he threatened another employee with physical harm, even in the absence of protected conduct.); see also, Arlington Hotel Co. and Int'l Ladies' Garment Workers Union, 278 NLRB 26 (1986)(conduct by complainant who charged a customer for only one buffet meal when, in fact, she had served him three buffet meals sufficient to justify termination even in the absence of protected conduct).

General Counsel does not contest that Maldonado's threats of Cruz was conduct sufficiently severe to move a termination, absent protected conduct. General Counsel simply reproaches Respondent for not including this reason for termination in its position statement; and that the inconsistency establishes pretext. However, the ALJ correctly excluded said position

statements from the evidence, under Kaiser Aluminum & Chemical, 339 NLRB 29 (2001), because they are protected by the work product privilege. **See, Tr., p. 345.** Respondent in this case specifically asserted that the position statements presented by it to the General Counsel during the investigation of the charges were confidential because they contain work product protected by confidentiality, and the ALJ correctly understood that they were. The ALJ's determination is supported by the Board's precedent and is reasonable. As such, the Board should affirm the ALJ's exclusion of Respondent's position statements as proof of pretext. **See, Tr., pp. 208-217 & 342-346).**

Also, even if the Board determines that the position statements are admissible, their probative value is questionable. As stated by the ALJ, the probative value of said statements is limited because "the way attorneys usually prepare position statements... they do so early in the game before they have a chance to investigate the matter as thoroughly as they do in preparing for a hearing." **Tr., p. 345.** Therefore, an inconsistency between a testimony during the hearing and statements made in a position statement, "might not represent anything more than a misunderstanding or an error or haste." Id. The evidence in the record establishes that the omission in the position statement of Maldonado's threat of Cruz responded to Mr. Ramos' legitimate concern for Cruz's safety. **See, Armando Ramos' Testimony, Tr. p. 465** (when asked why he omitted the issue of the threats in the position statement, he stated "[well], starting from the premise of the situation's graveness or severity, plus the emotional state of Mr. Joel Cruz... I understood that the degree of voracity (sic) in... Cruz's statement was believable and that exposed him to a serious – a possible serious situation which could even end in death, in my working company....") Therefore, the purported inconsistency is not probative of pretext, as suggested by General Counsel, and the Board should affirm the ALJ's finding in this regard.

With regards to Respondent's additional reason to terminate Maldonado's employment (*i.e.* customer complaints), General Counsel argues that Respondent failed to adequately investigate, which is not supported by the evidence. Respondent did investigate the complaints, and provided evidence to that effect. **See, Armando Ramos' testimony, Tr. pp. 455-457 & 460-462 & Exhibit R-10(b).** The fact that Respondent did not follow an investigation in a preferred manner, does not prove discriminatory animus, if an investigation was conducted, as was here. See, Cassone Bakery, supra.

On the other hand, with regards to Cruz's and Espada's terminations, only one of General Counsel's arguments merit discussion: that at the time of their hire, Respondents knew that Cruz and Espada did not have the required driver's license. However, during the evidentiary hearing, Julio Torres explained that the majority of the employees were transferred from the Municipality of Juana Díaz, who was in charge of providing the service of trash pick up prior to Respondent. **See, Julio Torres testimony, Tr., p. 386.** This was made pursuant to a commitment with the municipality assembly and the Mayor in order to absorb the employees. **Id., at p. 387.** Therefore, Torres explained, at the time of the recruiting there were employees who did not comply with the license category requirements. **Id.** However, thereafter, the Public Service Commission became stricter and Respondent issued a memorandum addressed to all employees requiring them to update their driver's license category. **See, Julio Torres testimony, Tr., pp. 385-386, 388; see also, Armando Ramos's testimony, Tr. pp. 449-450.** After that memo, Torres asked Cruz and Espada to update their category and/or renew their license, and they failed to do so. **See, Julio Torres' testimony, Tr. pp. 389-391; Armando Ramos' testimony, Tr., pp. 448-450; Cruz's testimony, Tr. at p. 133-135; Felipe Espada's testimony, Tr. p. 48.** Espada and Cruz's failure to fulfill the legal requirements to drive Respondent's trucks is sufficient to justify termination

under Wright Line affirmative defense. See, Susoni, 337 NLRB 537; see also, Sara Lee and Earthgrains, 348 NLRB 76 (NLRB 2006), 348 NLRB 76).

**Exception G:**

Complaint Paragraphs 11(a) and 11(c): LM Waste takes exception of the ALJ's finding that the discharge of Reinaldo Santiago was in violation of the Act. See, June 10th decision, at pp. 20-23.

General Counsel did not address Respondent's dispositive argument that complainant, Reinaldo Santiago, was a supervisor, as defined in the Act, and, as such, his termination could not violate the Act. Therefore, Respondent requests the Board to accept Respondent's Exception G.

**RESPECTFULLY SUBMITTED.**

By E-filing, in Washington, D.C., this 3<sup>rd</sup> day of September, 2009.

**CERTIFICATE OF SERVICE:** We hereby certify, that on this date a true copy of this document was filed electronically with the National Labor Relations Board through the E-Filing system. We also certify, that on this date a true copy of this document was served via e-mail to Alcides Reyes Gilestra, Esq., at [areyes@arglaw.net](mailto:areyes@arglaw.net); Ayesha K. Villegas-Estrada, at [ayesha.villegas-estrada@nrlrb.gov](mailto:ayesha.villegas-estrada@nrlrb.gov); Unión de Tronquistas de Puerto Rico, at [unitron@prtc.net](mailto:unitron@prtc.net). Also, a true copy of this document was sent via regular mail to Marvin Cardona, at Urb. Villa Madrid Calle 15 W9, Coamo, P.R. 00769.

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